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NO.

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1982

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VICTOR MANUEL STUART-CABALLERO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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## QUESTIONS PRESENTED FOR REVIEW

1. Whether the Contraband on the High Seas Act, 21 U.S.C. §955a, is unconstitutional where the statute attempts to impose strict liability on the possession of large amounts of marijuana by omitting the elements of knowing and intentional possession of a controlled substance?

2. Whether the decision below affirming Petitioner's conviction is contrary to prevailing law and results in a deprivation of constitutional rights, where the evidence did not establish his knowing and voluntary possession of marijuana and further failed to establish the nationality of the vessel on which Petitioner and the marijuana were located?

## LIST OF INTERESTED PERSONS

The only persons having an interest in the outcome of this case are the Petitioner, his family, and the United States of America.

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VICTOR MANUEL STUART-CABALLERO,

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vs.

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Petitioner, VICTOR MANUEL STUART-CABALLERO, respectfully prays that a Writ of Certiorari issue to review the judgment, opinion, and order of the United States Court of Appeals for the Eleventh Circuit entered in this proceeding on September 24, 1982.

## OPINIONS BELOW

The opinion of the Court of Appeals is reproduced in the Appendix attached hereto and is reported as United States v. Stuart-Caballero, 686 F.2d 890 (11th Cir. 1982). A copy of the order of the District Court denying the defense motion to dismiss is also contained in the Appendix.

## JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Amendment V:

> No person... shall be deprived of life, liberty, or property without due process of law...

Title 21 U.S.C. §955a:

> (a) It is unlawful for any person on board a vessel of

the United States, or on board a vessel subject to the jurisdiction of the United States on the high seas, to knowingly or intentionally manufacture or distribute, or to possess with intent to manufacture or distribute, a controlled substance.

* * *

(g)(1) Any person who commits an offense defined in subsection (a), (b), (c) or (d) of this section shall be punished in accordance with the penalties set forth in section 960 of this title.

(2) Notwithstanding paragraph (1) of this subsection, any person convicted of an offense under sections 955a to 955d of this title shall be punished in accordance with the penalties set forth in section 962 of this title if such offense is a second or subsequent offense as defined in section 962(b) of this title.

* * *

(h) This section is intended to reach acts of possession, manufacture, or distribution committed outside the territorial juris-

diction of the United States.

Title 21 U.S.C. §955b:

As used in sections 955a to 955d of this title --

(a) "Customs waters" means those waters as defined in section 1401(j) of Title 19.

(b) "High seas" means all waters beyond the territorial seas of the United States and beyond the territorial seas of any foreign nation.

(c) "Vessel of the United States" means any vessel documented under the laws of the United States, or numbered as provided by the Federal Boat Safety Act of 1971, as amended, or owned in whole or in part by the United States or a citizen of the United States, or a corporation created under the laws of the United States, or any State, Territory, District, Commonwealth, or possession thereof, unless the vessel has been granted nationality by a foreign nation in accordance with article 5 of the Convention on the High Seas, 1958.

(d) "Vessel subject to the jurisdiction of the United States" includes a vessel without nationality or a vessel assimilated to a vessel without nationality, in accordance with paragraph (2) of article 6 of the Convention on the High Seas, 1958.

(e) "Comprehensive Act" means the Comprehensive Drug Abuse Control and Prevention Act of 1970. All terms used in sections 955a to 955d of this title that are defined in the Comprehensive Act have the meanings assigned to them by that Act.

## STATEMENT OF THE CASE

Petitioner, VICTOR MANUEL STUART-CABALLERO, and two others were charged by a federal grand jury in the Southern District of Florida with possession with intent to distribute marijuana while on board a United States vessel, in violation of 21 U.S.C. §955a(a) and 18 U.S.C. §2. At the conclusion of a jury trial, all defendants were convicted. STUART-CABALLERO received a five-year term of incarceration to be followed by a five-year special parole term.

On October 8, 1980, at approximately 8:00 P.M., the United States Coast Guard cutter POINT FRANCIS was on patrol in international waters near the Bahamas.[1/] In command of the vessel was

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1/ This location was 120 miles from the coast of the United States.

Lt. Kim Krzywicki. At a point approximately ten miles northwest of Dog Rocks off the northeastern tip of Cay Sal Banks, the POINT FRANCIS sighted a vessel which, when illuminated by a spotlight from the Coast Guard cutter, was identified as the THOMAS E. from Norfolk, Virginia. The THOMAS E. was hailed and ordered to prepare for a Coast Guard boarding.2/ The weather that night was dark and rainy, and the seas were choppy.

Immediately upon utilizing the loud-hailer to direct the THOMAS E. to stop, the Coast Guard crew observed the pilothouse door of the THOMAS E. open while three unidentified individuals walked out to the deck. The three then

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2/ The THOMAS E. was described by Lt. Krzywicki as a lobster boat common to that area. Nothing unusual was noticed about the THOMAS E. prior to ordering the boarding.

reentered the cabin. Within seconds, lights of the THOMAS E. were extinguished as the vessel increased its speed and changed course.[3/] Then began a nine hour chase through international waters, during which time the POINT FRANCIS used its flashing blue light, siren, ship's whistle, loud-hailer, and radio in an unsuccessful effort to force the THOMAS E. to stop. During the chase, Lt. Krzywicki observed an unidentified brown grassy substance in the wake of the THOMAS E. It was not unusual, however, to observe similar looking substances in the water.

The vessel was eventually disabled with gunshots fired from the Coast Guard cutter at a distance about 17 miles from Cuban shores. Throughout

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3/ The THOMAS E. had not stopped when the three persons exited the pilothouse.

the initial observation and chase, the only violation observed by the Coast Guard was the THOMAS E. running without lights. This offense ordinarily results in the giving of a ticket to the vessel's operator.

As a boarding party pulled alongside the lobster boat, two Coast Guard officers smelled the odor of marijuana. During a search of the boat, the officers discovered bales of marijuana in the engine room and cargo holds. The three individuals found on board were arrested and transported to Miami, Florida. None of these persons were ever observed in the marijuana-laden areas of the vessel nor in possession of the contraband. At Miami, it was determined that the THOMAS E. was registered to Jorge Velazquez.

During the Coast Guard chase, the law enforcement officers on board

the cutter were of the opinion that a fourth man was on the THOMAS E., although only three persons were found at the time of boarding. This was consistent with the testimony of Ortega, who related at trial that he had been hired by Jorge Velazquez to travel on the THOMAS E. from Miami to the Bahamas to retrieve a boat seized by authorities for having unlawfully fished in Bahamian waters. Velazquez operated the boat; Ortega and the others on board, STUART-CABALLERO and Arias, slept in the pilothouse cabin. Ortega was unaware that the vessel carried marijuana until the Coast Guard chase, when Velazquez revealed the fact. It was during the chase that Velazquez abandoned the THOMAS E. by going overboard in a zodiac inflatable boat near Cuban waters.

## REASONS FOR GRANTING THE WRIT

I. THE CONTRABAND ON THE HIGH SEAS ACT, 21 U.S.C. §955a, IS UNCONSTITUTIONAL INASMUCH AS THE STATUTE ATTEMPTS TO IMPOSE STRICT LIABILITY FOR THE POSSESSION OF LARGE AMOUNTS OF MARIJUANA BY OMITTING THE ELEMENTS OF KNOWING AND INTENTIONAL POSSESSION OF A CONTROLLED SUBSTANCE.

The "Contraband on the High Seas Statute" -- 21 U.S.C. §955a -- was enacted in order to facilitate enforcement by the Coast Guard of the laws relating to the importation of illegal controlled substances. Senate Report No. 96-855, 1980 U.S. Code Cong. and Admin. News 5213. Through enactment of this law, Congress sought to regulate only acts which involve the importation of contraband and not mere possession on board a vessel in international waters.

In keeping with that intention, Congress recognized that its authority would be limited by principles of international law:

> Because the conduct we are attempting to regulate takes place beyond our territorial limits, international law consideration require some nexus to the United States before we can apply our statutes.

Commentary of Mark Aron, Acting General Counsel of Secretary of Transportation, April 20, 1979, 21 U.S.C. §955a. Yet, notwithstanding this respect for principles of international law, Congress has disregarded our own principles of jurisprudence in enacting a statute which does not require the essential element of knowledge. This defect, while serious by itself, is indicative of the prevalent lack of respect for our Constitution which seems to accompany legislative responses to the drug

problem. We submit that it is incumbent on this Court to correct this injustice.

The Act under review violates due process by attempting to impose strict liability for possession of large amounts of contraband without a showing of knowing and voluntary possession. As written, §955a prohibits the knowing and intentional manufacture or distribution of a controlled substance, but requires no scienter in cases of possession of contraband. The "knowingly or intelligently" language of the Act refers only to the manufacture or distribution and not the possession of a controlled substance.

There is absolutely no doubt that proof of unlawful knowledge or intent has always been deemed an indispensible element to narcotics possession offenses. For example, similar statutes

proscribing the possession of contraband, e.g., 21 U.S.C. §841, are not valid without the mandatory element of scienter. United States v. Edwards, 602 F.2d 458, 470 (1st Cir. 1979); United States v. Jackson, 588 F.2d 1046, 1056-1057 (5th Cir. 1979); United States v. Morales, 577 F.2d 769 (2d Cir. 1978). Because §955a contains no similar element, a person could be subject to prosecution and conviction if that person were merely present on board a seagoing vessel loaded with contraband for distribution without ever knowing that controlled substances were on board. This situation exists because the statutory element of intent to distribute, which is the only state of mind in the congressional language, is deemed to exist simply by the presence of a large amount of contraband. E.g., United States v. Shelnut, 625 F.2d 59

(5th Cir. 1980).

By enacting a strict liability statute for an offense which has never been recognized as a malum in se crime, Congress has seriously departed from long standing jurisprudential concepts that persons are not to be punished criminally without some intentional or purposeful conduct on their part. This Court ought to take this opportunity to correct this serious defect by granting certiorari review of this case and the statute at issue. By giving de facto guidance to Congress, this Court will protect individual liberties and at the same time promote reasoned and effective law enforcement.

## II. THE DECISION BELOW AFFIRMING PETITIONER'S CONVICTION IS CONTRARY TO PREVAILING LAW AND RESULTS IN A DEPRIVATION OF CONSTITUTIONAL RIGHTS, WHERE THE EVI-

DENCE DID NOT ESTABLISH HIS KNOWING AND VOLUNTARY POSSESSION OF MARIJUANA AND FURTHER FAILED TO ESTABLISH THE NATIONALITY OF THE VESSEL ON WHICH PETITIONER AND THE MARIJUANA WERE LOCATED.

In all criminal cases, the government has the responsibility of proving every element of the crime charged beyond a reasonable doubt. In Re Winship, 397 U.S. 358, 90 S.Ct. 1068 (1970). This burden is not dependent upon the status of the prosecuting authority, Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781 (1979) (due process requires same standard of proof in state criminal proceedings), or the status of the defendant. In Re Winship, supra, (beyond a reasonable doubt burden is applicable in adult and juvenile prosecutions). Yet, in the present case the Eleventh Circuit has imposed an altogether new standard of criminal respon-

sibility in situations involving mere transporters of contraband under conditions which amount to nothing more than ignorant involvement.

It is submitted that this emerging standard is completely erroneous and contrary to well established notions of criminal culpability. The conclusion of the appellate court ought to be reviewed for the very simple reason that, if upheld, this standard will impose criminal liability upon every individual who, without being cognizant of any illegal dealings, finds himself unknowingly immersed in the outer fringes of the drug trade.

In this case, as the appellate record and the affirmance opinion demonstrate, Petitioner was a crew member of a marijuana-laden lobster boat. He was never observed in actual possession of contraband; therefore, any constructive

possession that he may have had can only be established by proof that he knowingly exercised dominion and control over the marijuana. United States v. Willis, 639 F.2d 1335 (5th Cir.), reh. denied, 646 F.2d 189 (1981); United States v. Littrell, 574 F.2d 828 (5th Cir. 1978). That proof is not met by showing mere presence near contraband at the time of arrest. United States v. Bland, 653 F.2d 989 (5th Cir. 1981); United States v. Macker, 608 F.2d 223 (5th Cir. 1979).

The government's proof, when reduced to its essentials in light of the Eleventh Circuit opinion, is that the Coast Guard decided to board the THOMAS E. on the high seas. Prior to being able to board, the Coast Guard had to chase the vessel for many hours. The Coast Guard did not know who piloted the vessel, although when STUART-CABALLERO

and his two companions exited the pilothouse, the Coast Guard was of the belief that a fourth individual remained inside. When the Coast Guard succeeded in disabling the vessel by gun fire and was able to pull alongside, the odor of marijuana was detected. Marijuana was discovered in the holds of the engine room, although no marijuana or residue was found on STUART-CABALLERO, nor was Petitioner observed in any places where marijuana was found.

Proof in this case was constitutionally deficient. The flight of the THOMAS E. is not indicative of Petitioner's guilt for the very simple reason that the government did not prove who was piloting the vessel. That was the reason the trial judge did not instruct the jury as to proof of flight. See United States v. Jackson, 572 F.2d 636, 639-640 (7th Cir. 1978);

United States v. DeSimone, 600 F.2d 532, 537 (5th Cir. 1981). The odor of marijuana on board the THOMAS E. is also not proof of knowing and intentional possession. Odor and quantity of marijuana do not of themselves prove possession, particularly where there is no proof that those accused recognized the odor.

The opinion and record do not establish that STUART-CABALLERO had the authority or ability to exercise control over the contraband. There is nothing in the evidence which challenged the hypothesis that STUART-CABALLERO was a mere passenger/invitee on the THOMAS E. He was most definitely not the captain or owner of the vessel. Cf. United States v. Willis, supra (the captain of a vessel is presumed to be in control of his vessel which gives rise to an inference of knowing possession). Moreover, there was no proof

that STUART-CABALLERO was on the vessel for a length of time sufficient to warrant an inference of knowledge. E.g., United States v. McPherson, 664 F.2d 69 (5th Cir. 1981); United States v. Reyes, 595 F.2d 275 (5th Cir. 1979). This very insufficiency was the subject of judicial examination in United States v. Freeman, 660 F.2d 1030 (5th Cir. 1981). There, the Fifth Circuit upheld the conspiracy convictions of four individuals found on board the COWBOY, a vessel which contained 41,750 pounds of marijuana. The basis for the affirmance was as follows:

> Here we have (1) the same lengthy voyage (10 days); (2) the same large quantity of marijuana (41,000 pounds); and (3) the same close relationship between captain and crew inferable from the length of the voyage and the size of the vessel. Furthermore, the jury was entitled to consider

> DeWeese's inculpatory statements about the crew even though they rejected his exculpatory statements on their behalf. Based on DeWeese's testimony, the jury knew that there was, in fact, a close relationship between captain and crew. Furthermore, DeWeese made clear that the four appellants were well aware of the presence of marijuana aboard the COWBOY. In sum, the three Alfrey-DeWeese factors alone would be sufficient to establish a prima facie case of conspiracy to import. Here, the inferences to be drawn from those factors were buttressed by DeWeese's testimony.

Id. at 1035-1036 (footnote omitted). By contrast, no similar factors are present here.

The very same concerns ring true here and require clarification by this Court. Because the evidence did not exclude the reasonable hypothesis that Petitioner did not knowingly and

intentionally possess marijuana, his conviction and the affirming opinion of the Eleventh Circuit conflicts with other federal decisions. If the courts are to speak in consistent terms, this Court must provide appropriate guidance.

Another evidentiary point in need of review by this Court involves the statutory element of nationality of the THOMAS E. as a vessel of the United States. Notwithstanding the rather explicit definition of this element in 21 U.S.C. §955b(c) that a vessel of the United States means

> any vessel [1] documented under the laws of the United States, or [2] numbered as provided by the Federal Boat Safety Act of 1971, as amended, or [3] owned in whole or in part by the United States or a corporation created under the laws of the United States, or any State, Territory, District, Commonwealth or possession thereof, unless the

> vessel has been granted nationality by a foreign nation in accordance with Article 5 of the Convention on the High Seas, 1958

the appellate court refused to require strict adherence to this legislative mandate.

The only attempt by the government to comply with this definition was by evidence that the THOMAS E. was at one time registered as a United States vessel. There was a total absence of proof that the lobster boat was so registered on the day of its seizure. The case of United States v. Platenburg, 657 F.2d 797 (5th Cir. 1981), deserves consideration on this subject because it espouses a conflicting staement of law which we suggest is more appropriate to this case. That case involved a conspiracy to make false statements to a federally

insured bank. The Fifth Circuit held that because the insured status of a bank is an essential element of the offense, it is essential that the government prove that at the time of the offense the bank was insured. Such proof could not take the form of "a copy of a 1972 certificate of insurance, a certificate which antedates the charged events by seven years." Id. at 800. In the instant case, the same lack of proof was at issue. This Court cannot allow divergent results to be based on the mere distinction that a bank was involved in Platenburg, while a boat was involved herein. This conflict ought to be resolved by this Court.

## CONCLUSION

For the above stated reasons, a writ of certiorari should issue to

review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30 day of December, 1982, three copies of the Petition for Writ of Certiorari were delivered by mail to the Solicitor General, Department of Justice, Washington, D.C. 20530, and to

the United States Attorney's Office, 155 South Miami Avenue, Miami, Florida 33131.

BENEDICT P. KUEHNE

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